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# In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL U. DEMPSEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

## QUESTION PRESENTED

Whether the courts below properly imposed upon petitioner the initial burden of demonstrating that his prosecution for conspiracy to distribute marijuana violated the Double Jeopardy Clause.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 806 F.2d 766.

### JURISDICTION

The judgment of the court of appeals was entered on November 25, 1986. The petition for a writ of certiorari was filed on January 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After being indicted in the Southern District of Illinois on charges of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C.

846 (Pet. App. A12), petitioner moved to dismiss the indictment on double jeopardy grounds. He claimed that the scheme alleged in the indictment was part of the same conspiracy for which he had previously been convicted in the Eastern District of Michigan. The district court denied the motion (Pet. App. A15), and the court of appeals affirmed (Pet. App. A1-A6).

1. On October 25, 1984, petitioner was indicted by a grand jury in the Eastern District of Michigan on one count of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. The indictment alleged that from January 1, 1974, through December 31, 1982, in the Eastern District of Michigan and elsewhere, petitioner and eight named co-defendants conspired with Ned Garrett Shure, his brother Fred Charles Shure, and others, to distribute marijuana. As part of that scheme, the indictment alleged that petitioner and his co-defendants received bulk quantities of marijuana, some exceeding 1,000 pounds, for redistribution. Pet App. A7-A9. In February 1985, petitioner entered a plea of guilty to the charge. During the guilty plea proceeding, petitioner explained that his role in the conspiracy involved making trips to Michigan, picking up 1,000-pound quantities of marijuana, and taking them back to Illinois for distribution and sale. He also stated that he lived in a rural area in the southern part of Illinois.

On September 27, 1985, an indictment was returned in the Southern District of Illinois charging that petitioner, 13 co-defendants, seven named unindicted co-conspirators, and others conspired to distribute more than 1,000 pounds of marijuana in the Southern District of Illinois and elsewhere between April 1977 and November 1983. With the exception of petitioner, none of the co-defendants or the named

co-conspirators were among those named in the Eastern District of Michigan indictment.

Petitioner filed a motion to dismiss the Illinois indictment on double jeopardy grounds, claiming that the conspiracy alleged in that indictment was part of the scheme to which he had entered a guilty plea in Michigan. Petitioner also filed a series of discovery motions.

After denying the discovery motions, the district court conducted a hearing on petitioner's double jeopardy claim. During that proceeding, petitioner introduced the indictments in both cases as well as the transcript of the guilty plea proceeding in the Michigan case. In addition, he presented the testimony of two witnesses who stated that they had been unindicted co-conspirators in the Michigan case and that petitioner's role in that conspiracy had been to purchase quantities of marijuana from the Shure brothers in Michigan for redistribution in southern Illinois (Tr. 17-30). Although he was granted immunity from any subsequent use of his testimony at trial, petitioner chose not to testify during the double jeopardy hearing (Pet. App. A4). At the close of the proceeding, the district court denied the motion, finding that petitioner had not sustained his burden of establishing a double jeopardy violation (Tr. 32; Pet. App. A15).

2. Petitioner took an interlocutory appeal from that ruling. The court of appeals affirmed (Pet. App. A1-A4). The court observed that petitioner's evidence did not make out a double jeopardy violation, since petitioner may well have been engaged in more than one marijuana trafficking conspiracy in southern Illinois during the period in question. Because

there was no evidence of a link between the persons who were involved in the Michigan and Illinois conspiracies, and because petitioner did not testify at the hearing to provide such a link, the court found that petitioner had failed to "establish to [its] satisfaction that he was involved in only one conspiracy during the time period in question" (*id.* at A6). The court noted that its preliminary determination at the pretrial stage that the record before it failed to demonstrate the existence of a single conspiracy did not foreclose the possibility that evidence at trial would establish that the two conspiracies alleged were, in fact, components of a single unified scheme (*id.* at A4).

**ARGUMENT**

Petitioner contends (Pet. 6-12) that the court of appeals improperly imposed upon him the burden of demonstrating that the conspiracies alleged in the Michigan and Illinois indictments constituted the same offense for double jeopardy purposes. The burden imposed by the court of appeals in this case, petitioner claims, is significantly heavier than the burden imposed on defendants by several other circuits. In fact, however, the decision of the court of appeals in this case is consistent with the approach adopted in each of the appellate court decisions on which petitioner relies.

The courts of appeals that have addressed the question agree that when a claim of double jeopardy based upon successive conspiracy prosecutions is raised, the government has the burden of rebutting the claim by a preponderance of the evidence. See, *e.g.*, *United States* v. *DelVecchio*, 800 F.2d 21, 22 (2d Cir. 1986); *United States* v. *Thomas*, 759 F.2d 659, 662 (8th Cir. 1985); *United States* v. *Flick*, 716 F.2d

735, 738 (9th Cir. 1983); *United States* v. *Stricklin*, 591 F.2d 1112, 1118 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Inmon*, 568 F.2d 326, 331-332 (3d Cir. 1977). Each of these courts, however, has also held that, before any burden shifts to the government, the defense has the threshold burden of making a prima facie, nonfrivolous showing of a double jeopardy violation. As the court explained in *United States* v. *Stricklin*, 591 F.2d at 1117-1118:

> It is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant. It is similarly reasonable to require the defendant to tender a prima facie nonfrivolous double jeopardy claim before the possibility of a shift of the burden of persuasion to the government comes into play.
>
> * * * * *
>
> The defendant might make the necessary prima facie nonfrivolous showing of double jeopardy by reference to the indictment, as supplemented by a bill of particulars if appropriate and ordered, and other record material, alone. He might find it necessary to offer his own testimony at the pretrial hearing. If the latter course is followed, the defendant will not thereby waive the privilege against self-incrimination and his testimony may not subsequently be used against him at the trial on the merits.

The decision of the court below is fully consistent with these authorities. Noting the burden of proof analysis employed by the decisions cited by petitioner, the court of appeals identified the issue in the instant case as being whether petitioner had made the requisite nonfrivolous, prima facie showing of a dou-

ble jeopardy violation (Pet. App. A2-A3). It concluded that the showing he made during the hearing on the motion was insufficient to sustain that threshold burden.[1] Although petitioner presented evidence that both the Michigan and Illinois conspiracy charges involved the distribution of marijuana in southern Illinois, nothing that he presented at the hearing suggested any identity between the two conspiracies. As the court of appeals observed, petitioner was the only person named in the Michigan indictment who was also named in the Illinois indictment (*id.* at A4). And petitioner did not present

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[1] Petitioner also relies upon several earlier Seventh Circuit decisions to support his claim that, by contrast with the other courts of appeals, the Seventh Circuit imposes upon the defendant the ultimate burden of proving that multiple prosecutions violated the Double Jeopardy Clause. See Pet. 9-11 (citing *United States* v. *Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States* v. *West*, 670 F.2d 675, 681 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); and *United States* v. *Roman*, 728 F.2d 846, 854 (7th Cir.), cert. denied, 466 U.S. 977 (1984)). Although each of those cases contains language to the effect that a defendant bears the burden of establishing that successive prosecutions are for the same offense, none of them presents the question whether the government or the defense should bear the ultimate burden of proof whenever the defendant has made a threshold showing that the multiple prosecutions violate the Double Jeopardy Clause. As a result, it is unclear whether the court's language in those cases refers to the burden of persuasion once a colorable double jeopardy claim is asserted, or merely the initial burden of going forward. They do not, therefore, create a clear conflict with the decisions of the other courts of appeals. In any event, the court in this case made it clear that it was addressing only the initial burden of making a nonfrivolous prima facie showing of double jeopardy. In this respect, its holding that the burden rests with the defendant is in complete accord with the decisions of the other circuits.

any evidence that anyone involved in the Michigan conspiracy was also involved in the Illinois scheme. In fact, petitioner's principal witness at the evidentiary hearing—a participant in the Michigan conspiracy—admitted that he did not recognize the names of any of the 20 persons identified as petitioner's co-conspirators in the Illinois indictment.[2]

The bare fact that petitioner was distributing the marijuana from the Michigan conspiracy in southern Illinois is not enough to support a finding that the Illinois indictment was based on the same conspiracy as the Michigan indictment. Indeed, the lack of any overlap among petitioner's co-conspirators in the two charged schemes supported exactly the opposite inference. In light of petitioner's failure to testify at the hearing and the failure of his witnesses to suggest that the two conspiracies were part of the same scheme, the court of appeals was correct in finding that petitioner had failed to meet his initial burden of making a prima facie, nonfrivolous showing of a double jeopardy violation.[3]

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[2] Petitioner contends (Pet. 7-8) that the district court did not permit him sufficient discovery to enable him to prove that the two charged conspiracies were the same. The government, however, produced five co-conspirators who had cooperated with the government in the two cases and made the five available to testify at the evidentiary hearing. See Gov't C.A. Br. 5-6. Petitioner chose to call only two of those five witnesses, and they were unable to establish any connection between the two conspiracies other than to support petitioner's claim that he distributed the marijuana from the Michigan conspiracy in Illinois.

[3] Of course, as the court of appeals pointed out (Pet. App. A4), petitioner may yet prevail on his double jeopardy claim if the evidence at trial shows that the conspiracy charged in the Illinois indictment is the same as the conspiracy charged

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in the Michigan indictment. The court's ruling in this case did no more than hold that the evidence at this point is insufficient to justify dismissing the Illinois indictment prior to trial.

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